Supreme Court, U.S.
FILED
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NO. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA
OCTOBER TERM, 1994

MICHAEL RAMIREZ

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BRUCE N. SMITH
ATTORNEY FOR PETITIONER
2914 EASTEX FREEWAY, SUITE 102
BEAUMONT, TEXAS 77703
(409) 899-1046
FACSIMILE (409) 899-2648

34 pp

QUESTIONS PRESENTED

Question 1

Does the stop of a vehicle on the pretext of an infringement of a traffic law violate an individual's rights under the Fourth Amendment?

Question 2

Does an officer's questioning of the occupants of a vehicle about matters unrelated to the traffic stop constitute an illegal detention and violate an individual's rights under the Fourth Amendment?

Question 3

Was the consent given by the driver valid when said consent did not meet the guidelines for voluntariness set out in **Brown v. Illinois, 422 U.S. 590, 603-604 (1975)?**

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Petitioner, **MICHAEL RAMIREZ**, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in which the Court refused to suppress any and all evidence obtained through the illegal search and seizure of a vehicle in which Petitioner was a passenger.

OPINION BELOW

The opinion of the Court of Appeals is an unpublished opinion, **United States v. Ramirez, No. 93-5408,** and appears in Appendix A to this Petition. The opinion of the United States District Court of the Eastern Division of Texas is reported as **835 F.Supp. 926 (E.D.Tex. Sep. 2, 1993)**.

JURISDICTION

The Court of Appeals' opinion in this matter was filed on May 12, 1994. No Petition for Rehearing was filed. This Court's jurisdiction is invoked under **Title 28, U.S.C. §1254(1)**.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Amendment IV to the United States Constitution, as set forth in Appendix C.

STATEMENT OF THE CASE

The United States District Court, Eastern District of Texas, Beaumont Division, had jurisdiction pursuant to **Title 2, U.S.C. §1291**.

On November 18, 1992, an Indictment was returned against Petitioner in the Eastern District of Texas, Beaumont Division. The Indictment was returned against Petitioner charging him with the following:

a. Conspiracy to distribute and possess 5 kilograms or more of cocaine in violation of **21 U.S.C. §841(a)(1), §846, and 841(b)(1)(A)**;

b. Knowingly and intentionally possess with the intent to distribute cocaine, in violation of **21 U.S.C. §841(a)(1) and 841(b)(1)(A)**.

Petitioner entered a plea of guilty to Count 1 of the Indictment; Ramirez, however, reserved his right to appeal the District Court's ruling on his Motion To Suppress in the event that it was denied. Count 2 was dismissed on the Motion of the United States. On December 12, 1992, Petitioner filed a "Motion To Suppress Fruits Of Vehicle Search," obtained through the search of the vehicle in which Michael Ramirez was a passenger. On September 2, 1993, Petitioner's Motion To Suppress evidence was denied by the trial court.

Judgment was rendered by the District Court on September 29, 1993, wherein Petitioner was sentenced to the following: a term of 210 months in federal prison on one count, and 60 months in federal prison on the other count, both to be served concurrently with each other. Petitioner was also ordered to pay a special assessment of $50.00 for Count 1. On October 11, 1993, Petitioner gave notice of his appeal of the judgment and sentence to the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana. Such notice of appeal was timely filed.

Petitioner argued to the Court of Appeals for the Fifth Circuit that the trial court improperly denied his Motion To Suppress any and all of the evidence obtained through the illegal search of the U-Haul truck in which Petitioner was a passenger. Petitioner contended that the search of the vehicle was illegal and violated his Fourth Amendment rights in that it went beyond the scope of **Terry v. Ohio, 392 U.S. 1 (1968)**, because (a) the officers intended from the outset to detain and question the defendants -- even prior to approaching the vehicle; (b) the consent to search was tainted by the illegal detention; (c) the consent to search was invalid due to the flagrant misconduct of the police officers.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the following two reasons:

1. This Petition presents important questions of federal law which have not specifically and unequivocally been, but should be, settled by this Court.

2. The United States Court of Appeals for the Fifth Circuit has decided these federal questions in a way that, by implication, conflicts with applicable, previous decisions of this Court and with decisions of other United States Courts of Appeal on the same matter.

Upon review of the facts of this case, the law, and appellate cases, Petitioner would submit that the central and critical distinction between this case and others dealing with investigatory stops and search and seizure issues is that the stopping of the vehicle, in which Petitioner was a passenger, for alleged violations of traffic laws was from its inception an unconstitutional pretext for a search for contraband. Once the stop was made, the constitutional violations continued unabated -- making the whole series of events an appropriate textbook example of abridgment of Fourth Amendment rights.

QUESTION 1

PRETEXTUAL TRAFFIC STOP

The traffic stop made by Officers Froman and LaChance of a vehicle in which Michael Ramirez was a passenger was nothing more than a pretext for a search for contraband. That means simply that the police used a legal justification (an alleged traffic violation) to make a stop in order to search a person or place or interrogate a person for an unrelated serious crime for which the officers did not have supporting reasonable suspicion. According to Officer Froman, the driver was travelling 60 mph in a 55 mph zone and was tailing an 18 wheeler too closely. Those infractions, being minor, warranted a citation or warning, neither of which was ever issued to the driver, John Hanao. The question, put simply, is this: can a traffic stop, ostensibly made for a minor traffic violation, but, in reality, employed as a subterfuge in order to investigate for contraband, properly serve as a basis for the subsequent search of the vehicle?

The traffic stop in question was not a detention with the purpose of improving highway safety through the issuance of a citation or warning for unsafe driving; instead, the traffic stop was a mere ruse or pretext for stopping the vehicle, detaining the driver and his passenger, and running a license check--all the while questioning the driver and passenger about matters wholly unrelated to the initial traffic stop.

The issues surrounding pretextual traffic stops have been considered on numerous occasions by the various United States Courts of Appeal; there is a split of authority regarding the constitutionality of those stops. In determining whether an investigatory stop is an unconstitutional pretext stop, the Tenth and Eleventh Circuits employ what has been called the "objective" or "would" test. **United States v. Guzman,** 864 F.2d 1512 (10th Cir. 1988); **United States v. Smith**, 799 F.2d 704 (11th Cir. 1986). Under that test, the question is not whether under the same circumstances a reasonable officer could validly have made the traffic stop, but whether under the same circumstances a reasonable officer would have made the stop in the absence of a valid purpose. If officers normally stop and detain drivers who are driving five (5) miles per hour above the speed limit, as well as drivers who are tailing too closely, then the stop may very well not be a pretext. Otherwise, under the "would" test employed in Guzman, said stop would not only be a pretext, but an unconstitutional one at that. As Guzman points out, police officers may always issue appropriate citations to drivers who violate traffic laws, but if the stop is unconstitutionally pretextual, the evidence of a more serious crime discovered pursuant to such stop will be excluded.

A different position regarding investigative stops has been taken by the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits. These courts have adopted what has been called the "could" test to evaluate investigatory stops. Under that test, a stop is valid if the officer "could" have stopped the car in question for a suspected violation. **United States v. Shabazz, 993 F.2d 431 (5th Cir. 1993); United States v. Ferguson, 8 F.3d 385 (6th Cir. 1993)**. Therefore, so long as the police are doing no more than what they are legally permitted and objectively authorized to do, the resulting stop or arrest is constitutional. The "could" test, though simple on its face, allows for and, indeed, promotes government

violation of an individual's Fourth Amendment right to be free from unreasonable searches and seizures. If pretext stops are permitted without any restrictions or guidelines, then officers on the state and interstate highways can use any traffic violation, no matter how minor, as an excuse to stop and search a vehicle. Such action amounts to what one court has called "patrolling the outer fringes of the Fourth Amendment."

The instant case is a unique one in that the Officers Froman and LaChance made no attempt at the hearing on the Motion To Suppress to disguise the traffic stop as something other than what it is -- namely a pretext for contraband search. In their own testimony, they stated that they are assigned to narcotics interdiction (Motion To Suppress Hearing, p. 48, 11.9-10), and that they use the traffic stop as part of the narcotics interdiction process. (Motion To Suppress, p. 31, 11.11-14). That admission in and of itself distinguishes this case from others and makes the stop of Ramirez and Hanao pretextual from its inception. Under the standard used in Tenth and Eleventh Circuits, the stop would not have occurred, because a reasonable officer would not have pursued the matter, absent the invalid purpose. Based on that standard, the stop was unconstitutionally pretextual and, therefore, constituted a violation of Petitioner's Fourth Amendment rights; any evidence obtained thereafter should have been suppressed as fruits of the poisonous tree.

The traffic stop in the instant case is an investigative detention analogous to a Terry stop. **Terry v. Ohio, 392 U.S. 1 (1968); United States v. Gonzalez-Lerma, 14 F.3d 1479 (10th Cir. 1968).** Its reasonableness is evaluated on the basis of two (2) criteria:

1. Whether the officer's action was justified at its inception; and

2. Whether the action was reasonably related in scope to the circumstances that first justified the interference.

In applying the Guzman test to the Terry stop of the vehicle, the stop was not justified at its inception, because the officers intended from the inception of the stop to use the stop as a pretext to search for contraband. Thus, the stop was unconstitutional and any alleged consent to search given by the driver, Hanao, was tained by the Fourth Amendment violation. As the court so aptly remarked in **United States v. Rich, 992**

F.2d 502 (5th Cir. 1993), the officers "were patrolling the outer fringes of the Fourth Amendment," and in the instant case, Officers Froman and LaChance crossed over the line.

QUESTION 2

ILLEGAL DETENTION

If a valid traffic stop is made, a temporary detention for questioning is justified when the officer has reasonable suspicion of illegal transactions in drugs or of any other serious crime. Even when the stop is valid, which it was not in this case, it will become an illegal detention, however, if the officers conduct an investigation that is not reasonably related to the justification for the stop.

The detention and questioning of Ramirez and Hanao concerning the purpose of their trip, the origin and destination of their trip, the furniture they were carrying, the airline they flew on, and the hunt for a job did not relate to the traffic stop itself and exceeded the scope of investigation necessary to dispose of the alleged traffic violations of speeding and "tailing" too closely. At the hearing on the Motion To Suppress, Officer LaChance confirmed in his testimony that the officers' questioning of Ramirez and Hanao had nothing to do with the reason for which the officers stopped them. (R. p. 47). Such conduct -- the continued detention and questioning unrelated to a traffic violation -- was unreasonable. **United States v. Walker, 933 F.2d 812 (10th Cir. 1992)**

In the instant case, the driver, Hanao, produced a valid driver's license, along with rental papers showing his entitlement to operate the car. Having done so, he should have been allowed to proceed on his way, without being subjected to further delay by police for additional questioning. Officer Froman's license check revealed that the license was valid and that there were no outstanding warrants for the arrest of either occupant of the vehicle. (R. p.36). The results of the check, however, were of little consequence to the officers. Indeed, Officer LaChance was so caught up in the narcotics interdiction that he never even bothered to find out what the results of the license and warrant check were. (R. p.88). The license return was significant, however, because once it is known that the license is valid, that the person driving

the vehicle is entitled to do so, and that there are no outstanding warrants on the persons being detained, further questioning is impermissible and violates the individual's Fourth Amendment rights. **Guzman, 864 F.2d 1512.** In only two (2) limited circumstances is further questioning permissible:

1. The officer may detain the driver for questioning unrelated to the initial traffic stop if he has an objectively reasonable and articulable suspicion that illegal activity has occurred or is occuring;

2. Further questioning is permissible if the initial detention has become a consensual encounter. **United States v. Gonzalez-Lerma, 14 F.3d 1479 (10th Cir. 1994).**

In the hearing on the Motion To Suppress, Officers Froman and LaChance alleged that the conflicting stories (which were never shown to be truly conflicting), the nervousness of Ramirez and Hanao, an odor from the truck, and the occupants' travel from Houston, a major narcotics source, provided the officers with sufficient, reasonable suspicion of illegal activity. (R. p.40). Those factors, however, are as consistent with innocent activity as they are with any illegal conduct; they do not support the officers' contention that they had reasonable, articulable suspicion of illegal activity which would allow further detention and questioning.

Because the questioning of the occupants of the vehicle concerned matters unrelated to the traffic stop, and because the officers had no reasonable, articulable suspicion of illegal activity, the detention of Ramirez and Hanao after the traffic stop was illegal. The illegal detention, as well as the stop itself, violated Fourth Amendment rights of Ramirez and Hanao and tainted any subsequent consensual search of the truck, since the investigation conducted by the officers was not reasonably related in scope to the purpose of the stop. As the Fifth Circuit Court of Appeals stated in **United States v. Kelley, 981 F.2d 1464 (5th Cir. 1993)**, under appropriate circumstances, extensive questioning about matters wholly unrelated to the purpose of a routine traffic stop may violate the Fourth Amendment. The questioning that took place in the instant case constituted an unreasonable detention and violated Petitioner's Fourth Amendment rights.

QUESTION 3

WAS CONSENT VALID?

Many courts have held that a search preceded by a Fourth Amendment violation remains valid if the consent to search was voluntary in fact under the totality of the circumstances. **United States v. Fernandez, 18 F.3d 847 (10th Cir. 1994); United States v. Kelley, 981 F.2d 1464 (5th Cir. 1993).** If that is the case, the consent by Hanao for the search of the U-Haul truck, if valid, would remove any taint of the pretext stop and illegal detention and would render the search valid.

In regards to the issue of consent, the government bears the burden of proving the voluntariness of consent, and that burden is heavier when consent is given after an illegal stop. **United States v. Fernandez, 18 F.3d at 881 (10th Cir. 1994).** The government must establish that the defendant's consent to search is sufficiently an act of free will to purge the primary taint of the illegal seizure; if it does not, the evidence obtained as a result of the consent and search must be suppressed as fruit of the poisonous tree.

The test frequently cited for voluntariness of consent is quoted below:

1. Voluntariness of defendant's custodial status;

2. Presence of coercive police procedure;

3. Extent and level of Defendant's cooperation with the police;

4. Defendant's awareness of his right to refuse to consent;

5. Defendant's belief that no incriminating evidence will be found.

United States v. Kelley, 981 F.2d 1464 (5th Cir. 1993).

A review of the six (6) factors noted above reveals that the alleged consent of Hanao was no consent at all. He and the Petitioner, Ramirez, were not free to go from the time of stop onward, as admitted in the testimony of Officers Froman and LaChance; there was nothing voluntary about the custodial status of Ramirez and Hanao. Secondly, the officers questioned them extensively and, indeed, requested permission to initate and conduct the search of the vehicle even while the license and warrant checks were still being made. Such conduct represents an insidious form of coercion since it is difficult for a person to refuse consent at the same time as he is being involuntarily detained. Thirdly, Defendants cooperated with the police at all times; however, they were never told, either directly or indirectly, that they could refuse to consent to the search. The application of the above factors to Hanao's alleged consent to the search reveals that any consent was merely illusory.

When examining the totality of the circumstances regarding the detention, alleged consent, and search of Ramirez and Hanao, the court is further to consider the three factors set out by the Supreme Court in **Brown v. Illinois, 422 U.S.590, 603-604 (1975)**:

1. The temporal proximity of the illegal stop and the consent;

2. Any intervening circumstances to purge the taint of any illegality from any unreasonable detention;

3. The purpose and flagrancy of the official misconduct.

Although the government would have one to believe that the application of the three **Brown** factors would establish that the consent was valid, such is not the case; instead, the three factors all weigh heavily against the government. In regards to the first element, the record reveals that the illegal stop and the consent were in close proximity of time to each other, so close, in fact, that there was only a five (5) minute lapse of time between the initial stop and the consent. An individual, feeling the immediate constraints of detention and questioning unrelated to the stop, would feel an undue amount of pressure to consent to the search. As the Tenth Circuit declared in **United States v. Ward, 961 F.2d 1526, 1534 (10th Cir. 1992)**, the element of close proximity in time between the

illegal stop and the consent renders the consent involuntary. Moreover, at the time that Hanao signed the consent form, the officers had not yet received a return on Hanao's license (R. p.23); therefore, Ramirez and Hanao were not free to go at the time of consent, as the officers affirmed at the hearing on the Motion To Suppress. (R. pgs.34, 90). In addition, the officers never informed Hanao, let alone Ramirez, that he had a right to refuse to sign the consent. Thus, at every point, the consent was ineffective. (R. p.40). Like the six point test in **United States v. Kelley, 981 F.2d 1464 (5th Cir. 1992),** the application of the three point test in **Brown v. Illinois, 422 U.S. 590 (1975)** to the instant case reveals the illusory nature of the consent and establishes that the consent was invalid, because it was involuntary.

Not only was the search illegal, because it was based on an unconstitutional pretext stop and an illegal detention, but the search was also further tainted because it was not within the scope of consent. It was only after Hanao had signed the consent form and the officers had removed a few items of furniture from the truck that the officers decided that the truck and its occupants should be removed to the police facility to complete the search. (R. p.11). The officers never suggested to or told Ramirez or Hanao prior to Hanao's signing the consent form that the officers wanted to take the truck to the city barn to complete the search. (R. p.78). There were, therefore, no intervening circumstances to purge the taint of the pretext stop and illegal detention. Indeed, the circumstances of the whole affair worsened with each minute of the stop in a crescendo of Fourth Amendment violations. The culmination came when the officers removed Hanao and Ramirez from the shoulder of Interstate 10 to the confines of a police facility where the search was continued. As Hanao testified in the Motion To Suppress hearing, he was never informed at the time of the signing of the consent form that there was even a possibility of their being transported to a police facility to complete the search. The continued detention and removal merely confirmed the pretextual purpose and flagrant police misconduct which characterized the whole affair.

As the Supreme Court declared in **Florida v. Royer, 460 U.S. 491 (1983)**, a suspect's consent to a search is tainted by an illegal detention and is ineffective to justify the search. What may have begun

as a consensual inquiry in a public place, namely Interstate 10 in Beaumont, Texas, escalated into an investigatory procedure in a search at the city barn. To use a phrase from **Florida v. Royer, id. at 240,** any consensual aspects of the encounter had simply evaporated.

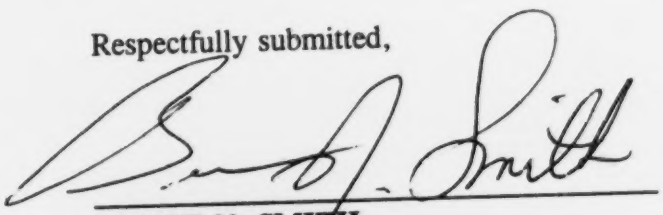
In brief, the stop of Ramirez and Hanao was an unconstitutional pretext stop; their detention and questioning concerning matters unrelated to the stop were further violations of the Fourth Amendment; and any alleged consent was tainted by Fourth Amendment violations and was rendered invalid. Based on those grounds, the District Court should have granted Petitioner's Motion To Suppress.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this matter.[1]

DATED: August 9, 1994.

Respectfully submitted,



BRUCE N. SMITH
2914 Eastex Freeway #102
Beaumont, Texas 77703
(409) 899-1046
TELE-FAX (409) 899-2648
State Bar No. 18543300

[1]If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the United States Court of Appeal for the Fifth Circuit for redetermination in light of the Court's opinions in Terry, supra, and Brown, supra.

APPENDIX A

U.S. COURT OF APPEALS
FILED MAY 12, 1994
CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5364
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN J. HENAO,
Defendant-Appellant

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No. 93-5408
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MICHAEL RAMIREZ
Defendant, Appellant

Appeal from the United States District Court
for the Eastern District of Texas
(1:92-CR-153-1 and 1:92-CR-153-2)

BEFORE KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.
PER CURIAM:[1]

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and

John Henao and Michael Ramirez, having entered conditional guilty please to conspiracy to possess with the intent to distribute cocaine, appeal the denial of their motions to suppress. Ramirez contends also that his plea agreement was breached. We **AFFIRM.**

I.

On November 12, 1992, Henao and Ramirez were traveling in a Toyota U-Haul truck on Interstate 10 in Beaumont, Texas, when they were pulled over by Beaumont Police Officers Froman and LaChance for speeding and following too closely (violations of Texas traffic laws). Officer LaChance walked to the back of the truck, motioned for Henao to get out of the truck, and asked Henao for his driver's license. He noticed that Henao was nervous, would not look at him, and "couldn't stay still." Officer Froman approached the passenger side of the truck, asked Ramirez to retrieve the truck's rental papers, and noticed that Ramirez's hands were "shaking rather badly". The officers questioned Henao and Ramirez individually about their travel plans to, and recent stay, in Houston. Henao and Ramirez gave conflicting answers. When Officer LaChance speculated that the truck must contain furniture if Henao was moving to Connecticut, Henao replied, "Yeah ... do you want to see"? LaChance replied that he would, Henao opened the back of the truck, and LaChance saw "a truck full of furniture, and at the same time [he] smelled a very strong odor of some type of solvent ... a strong glue-type smell".

LaChance asked Froman to run a license and warrant check on Henao. Based upon Henao's and Ramirez's conflicting answers to questions, their nervous behavior, and the odor coming from the back of the truck, the officers decided to seek consent to search the truck. Froman testified at the suppression hearing that after Henao had given him verbal permission to search the truck, he completed a consent to search form, read and explained it to Henao, and allowed Henao to read it. Froman also testified that the initial stop took place at 10:10 am., he presented the consent form to Henao at 10:15 a.m. and, as of 10:15 a.m., the officers had not received the results of the license/warrant check. After Henao signed the consent form, the officers asked him if

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burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

"he would have a problem with [them] moving the vehicle away from the highway to [the police] maintenance facility [approximately 1.2 miles away] ... so that [they] could remove a partial load of the furniture so that [they] could examine it". Henao gave oral permission, the truck was moved, and during the subsequent search approximately 150 kilograms of cocaine were discovered.

Henao and Ramirez were indicted for conspiracy and possession with the intent to distribute cocaine, in violation of 21 USC §§ 841(a)(1), 841(b)(1)(A), and 846. They entered conditional plea agreements on the conspiracy count, reserving their rights to withdraw the pleas if their motions to suppress were granted.[2]

After an evidentiary hearing, at which Froman, LaChance, Henao, and Ramirez testified, the district court held that the search and seizure were lawful and denied the motions to suppress. *United States v. Henao,* 835 F. Supp. 926 (E.D. Tex. 1993). Henao was sentenced, *inter alia,* to 168 months imprisonment; Ramirez, 210 months.[3]

II.

Henao and Ramirez maintain that the district court erred in denying their motions to suppress because (1) the officers stopped them on the pretext of a traffic violation, but the real purpose was drug interdiction; (2) the detention was illegal because the officers questioned them about matters unrelated to the traffic violations; (3) Henao's consent to search the truck was not voluntary; and (4) the search exceeded the scope of the consent given. Ramirez also contends that the Government breached the plea agreement by refusing to move for a downward departure, and that the district court erred by failing to find that his willingness to testify in the Florida action constituted "substantial assistance."

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[2] Ramirez also pleaded guilty to a money laundering conspiracy charge from the Southern District of Florida, with the sentence to be imposed by the United States District Court for the Eastern District of Texas in conjunction with sentencing on the cocaine conspiracy charge.

[3] Ramirez was sentenced also to 60 months imprisonment on the money laundering conspiracy conviction, to run concurrently with his sentence on the cocaine conspiracy conviction.

A.

"On appeal, we review the district court's findings of fact for clear error; conclusions of law are examined *de novo*". *United States v. Shabazz*, 993 F.2d 431, 434 (5th Cir. 1993). "The evidence is viewed most favorably to the party prevailing below, except where such a view is inconsistent with the trial court's findings or is clearly erroneous considering the evidence as a whole". *Id.*

"A routine traffic stop is a limited seizure that closely resembles an investigative detention". *Id.* at 435. Accordingly, cases in which motorists have been stopped for violating traffic laws are analyzed under the framework established in *Terry v. Ohio*, 392 U.S. 1 (1968). *Shabazz*, 993 F.2d at 435. "Under *Terry*, the judicial inquiry into the reasonableness of a search or seizure is a dual one -- whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place". *Id.* (quoting *Terry*, 392 U.S. at 19).

1.

The district court held correctly that the initial stop was justified by the officers' observing Henao commit two traffic violations. Ramirez's claim that the stop was a pretext for the officers' primary purpose of drug interdiction is foreclosed by our court's decision in *United States v. Causey*, 834 F2d 1179, 1185 (5th Cir. 1987) (en banc) ("where the officers have taken no action except what the law objectively allows[,] their subjective motives in doing so are not even relevant to the suppression inquiry").

2.

The district court also concluded correctly that the questioning and detention did not exceed the scope of the original purpose of the stop. Our court has rejected the proposition that a "police officer's questioning, even on a subject unrelated to the purpose of the stop, is itself a Fourth Amendment violation". *Shabazz*, 993 F2d at 436. Questioning that takes place during the pendency of a warrant or license check incident to a valid traffic stop does not exceed the scope of the stop. *Id.* at 437. The district court credited implicitly the testimony of the officers that the questioning took place, and the consent to search was received, while the officers were awaiting the results of the computer check of Henao's license. These findings are supported by the evidence, viewed in the light most favorable to the Government. Accordingly, the district court did not clearly err in finding that the detention was not

unreasonably lengthy and that it did not extend beyond the period justified by the valid traffic stop.

3.

Our court set forth the standards for assessing the voluntariness of consent in *United States v. Kelley*, 981 F.2d 1464 (5th Cir.), *cert. denied*, ____ U.S. ____, 113 S. Ct. 2427 (1993):

> To be valid, consent to search must be free and voluntary. The government has the burden of proving by a preponderance of the evidence, that the consent was voluntary.... The voluntariness of consent is a question of fact to be determined from the totality of all the circumstances. We will not reverse the district court's finding that consent was voluntary unless it is clearly erroneous. Where the judge bases a finding of consent on the oral testimony at a suppression hearing, the clearly erroneous standard is particularly strong since the judge had the opportunity to observe the demeanor of the witnesses.
>
> In evaluating the voluntariness of consent, we have considered six factors:
>
> > (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education

> and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.
>
> All six factors are relevant, but no single one is dispositive or controlling.

Id. at 1470 (internal quotation marks and citations omitted).

The district court made specific findings on all six factors: (1) Henao was not free to leave while the computer check was pending; (2) the officers did not use any coercive tactics; (3) Henao cooperated fully, did not display any antagonism during the stop, and offered to let the officers look into the back of the truck; (4) Henao read the standardized consent form which contained a clause informing him of his right to refuse to consent; (5) Henao is a high school graduate and has studied civil engineering at a technical college; and (6) the record is unclear whether Henao believed incriminating evidence would be found. The district court concluded that the factors "as a whole clearly demonstrate that Henao's consent to the search was voluntary". The district court did not clearly err in finding that Henao voluntarily consented to the search. *See Kelley,* 981 F.2d at 1470-71.

4.

Henao's contention that the search of the truck at the police facility exceeds the scope of his consent is also unavailing. The evidence, viewed in a light most favorable to the Government, supports the conclusion that Henao gave oral and written permission to the officers to search the truck and its contents. Although it is true, as Henao asserts, that the consent form described the truck where it was stopped along the interstate highway, nothing in the consent form limited the search to the location of the stop. Moreover, testimony at the suppression hearing established that (1) Henao made an unsolicited offer to the officers to allow them to look in the back of the truck, (2) he then gave oral permission for the truck to be searched, (3) he read and signed a consent form which explained that he had the right to refuse consent, (4) he orally consented to moving the truck to a difference location to be searched, and (5) at no time did he protest the move or the search or otherwise attempt to withdraw his consent. See *United States v. Ponce,* 8 F.3d 989, 998 (5th Cir. 1993) (citing *United States v. Gonzalez-*

Basulto, 898 F.2d 1011, 1013 (5th Cir. 1990)) (a defendant's failure to protest may be considered as evidence that the search did not exceed the scope of consent).

B.

Ramirez contends that his willingness to testify in the Florida case should be considered as "substantial assistance to the Government, warranting a downward departure. He asserts that the Government breached the plea agreement by failing to move for a downward departure, and that he "must be allowed the opportunity to withdraw his plea or move for vacation of the sentence and resentencing by a different judge".

At his sentencing hearing, Ramirez brought to the district court's attention that information he provided to the United States Attorney for the Southern District of Florida and his agreement to testify against other defendants in Florida enabled the Government to obtain guilty pleas in a pending case. But, Ramirez did not contend at sentencing that the Government had breached the plea agreement, did not object to the imposition of sentence on the ground that the Government had failed to file a motion for downward departure, and did not ask to withdraw his plea. The district court did not make any findings as to whether Ramirez's willingness to testify constituted substantial assistance and declined to depart downward from the guideline sentence because the Government had not filed a motion for downward departure.

Because Ramirez did not object concerning a departure and did not move to withdraw his plea, we review his plea agreement breach contentions only for plain error. *United States v. Palomo,* 998 F.2d 253, 256 (5th Cir.), *cert. denied,* _____ U.S. _____ 114 S.Ct. 358 (1993). "Because the failure of the Government to fulfill its promise ... affects the fairness, integrity, and public reputation of judicial proceedings, ... a prosecutor's breach of a plea agreement can amount to plain error". *Id.* (brackets, internal quotation marks, and citation omitted).

> In determining whether there has been a breach of the plea agreement, we must determine whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement. Whether the government's conduct violated the terms of the plea agreement is a question of law. [The defendant] bore the burden of proving the underlying facts establishing a breach by a preponderance of the evidence.

> *Id.* (internal quotation marks and citations omitted).

A district court cannot depart downward under U.S.S.G. § 5K1.1 unless the Government makes a motion to that effect. *Wade v. United States*, ___ U.S. ___, 112 S. Ct. 1840 (1992). Section 5K1.1, and its statutory counterpart, 18 U.S.C. §3553(e), give the government "a power, not a duty" to file such a motion. *Id.* at ____, 112 S. Ct. at 1843. But, the Government may bargain away its discretion in a plea agreement. *United States v. Hernandez*, 17 F.3d 78, 82 (5th Cir. 1994).

Ramirez's plea agreement provides:

> If the Government determines that the Defendant has provided substantial assistance in the investigation and prosecution of other federal law offenders, pursuant to his cooperation agreement, including but not limited to that if the Defendant is called upon to testify in a District Court and the Court is impressed with the truthfulness of his testimony, the United States will move that the sentencing Court depart from the guidelines in a downward manner pursuant to Section 5K1.1 or in the alternative, move that the Sentencing Court reduce the Defendant's sentence pursuant to the provisions of Rule 35(b) of the Federal Rules of Criminal Procedure. *The decision on whether or not to file such a motion will be jointly agreed upon by the respective United States Attorneys for the Southern District of Florida and the Eastern District of Texas*. The defendant understands that even if such a request is made by the Government, that the Court has the sole discretion to grant or deny such a request.

(Emphasis added.) The terms of Ramirez's plea agreement reflect that the Government retained its discretion to make the decision whether to file a downward departure motion. Because the agreement imposes no obligation on the Government to file such a motion, Ramirez failed to prove a breach, and the district court did not commit plain error by refusing to consider whether Ramirez's willingness to testify in Florida constituted substantial assistance.[4]

III.

For the foregoing reasons, Henao's conviction, Ramirez's conviction and sentence, and the order denying the motion to suppress are

AFFIRMED.

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[4] In his summary of the argument, Ramirez asserts that the district court erred in denying his request for a four-level or two-level decrease in his offense level for his minimal or minor participation in the offense. *See* U.S.S.G. § 3B1.2. However, the argument section of his brief contained only one sentence relevant to this contention, which seems to be a concession that he did not meet his burden of proving his entitlement to the reduction: "The Court found that there was no information provided by the Defendant or the Government to show that Appellant was an organizer, leader or supervisor or that he was a minor or minimal participant". In any event, Ramirez failed to comply with Fed. R. App. P. 28(a)(5), which provides that an appellant's argument "must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on". We refuse to consider issues not properly briefed. *See, e.g., Abbott v. Equity Group, Inc.*, 2 F.3d 613, 627 n.50 (5th Cir. 1993), *cert. denied*, ____ U.S. ____, 114 S. Ct. 1219 (1994).

APPENDIX B

EOD SEP 30 1993

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
DAVID J. MALLAND, CLERK
BY DEPUTY _____

AO 245 S(Rev. 4/90 - EDTX 12/91) Sheet 1 - Judgment in a Criminal Case Mon Sep 27 16:11:17 CDT 1993

UNITED STATES DISTRICT COURT
EASTERN District of TEXAS
JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA

(For Offenses Committed On or After November 7 1987)

V. **Case Number 1:92cr153-2**

MICHAEL RAMIREZ (SEE JUDGMENT IN 1:93cr111-1)
A.K.A. Miguel Ramirez

Defendant's Attorney: Bruce N. Smith

THE DEFENDANT:
Pleaded guilty to count(s): 1 of the Indictment
Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense
21 USC 846	Did knowingly and intentionally conspire, combine, confederate and agree together and with other persons to distribute and possess with intent to distribute, a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance

Date Offense Concluded	Count Number(s)
11/12/92	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

count(2) is/are dismissed on motion of the United States.

It is ordered that the defendant shall pay a special assessment of $50.00 for count(s) 1, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Date of Imposition of Sentence:

9/29/93

/s/Raymond Armstrong
U.S. Probation Officer

/s/ Howell Cobb
Signature of Judicial Officer
Date 9/29/93

HOWELL COBB, U.S. DISTRICT JUDGE

Name & Title of Judicial Officer

Defendant's:
Social Security No: 044-80-6294
Date of Birth: 8/1/71
Mailing Address: 117 Clinton Avenue
Stamford, CT 06901
Residence Address: same

Defendant: MICHAEL RAMIREZ Judgment - Page 2 of 4
Case Number: 1:92cr153-2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 210 months.

This term of imprisonment consists of 210 months as to Count One of 1:92cr153 and 60 months as to County One of 1:93cr111 to run concurrent with each other.

The Court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be incarcerated in the New England area of the United States.

The defendant is remanded to the custody of the U.S. Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ **to** _____ _____ **at** _____ **with a certified copy of this judgment.**

_____
United States Marshal

By_____
Deputy Marshal

Defendant: MICHAEL RAMIREZ Judgment - Page 3 of 4
Case Number: 1:92cr153-2

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

5 yrs. as to Ct. 1 of 1:92cr153 and 3 yrs as to Ct. 1 of 1:93cr111, to run concurrently.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall also comply with the following conditions:

The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons

The defendant shall not possess a firearm or destructive device.

The defendant shall participate in a program approved by the U.S. Probation Office for substance abuse, which may include testing to determine whether the defendant has reverted to the use of illegal drugs and/or alcohol.

OTHER CONDITIONS:

The defendant shall provide the probation officer access to any requested financial information.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In ADDITION:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal

record or personal history or characteristics, and shall permit the probation officer to make such notification, and to confirm the defendant's compliance with such notification requirements.

STATEMENT OF REASONS

The Court adopts the factual findings and guideline applications in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level: 35
Criminal History Category: I
Imprisonment Range: 168 to 210 months
Supervised Release Range: 5 years
Fine Range: $20,000 to $4,000,000

Fine is waived or is below the guideline range, because of defendant's inability to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

Investigation of the case reveals that the defendant has been involved in numerous criminal activities. As a result of his unlawful behavior, his offenses of conviction involve him possessing with intent to distribute over 160 kilograms of cocaine which was 93% pure, and his laundering of illegal proceeds from specified unlawful activities in excess of $1.3 million. While investigation of this case does not reveal that the defendant was a high-level player who could afford such large quantity of pure cocaine as well as be the owner of such a large sum of cash, there is no information to suggest that the defendant would not be a major player. Considering the defendant's extensive involvement in these offenses, a 210 month sentence appears appropriate to address the sentencing objective of punishment, general deterrence and incapacitation.

APPENDIX C

CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.